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The New Constitution of Ghana

[Some underlying principles]

B. D. G. Folson

THE PUBLICATION IN JANUARY, 1968 OF THE Proposals for a new Constitution for Ghana put forward by the Constitutional Commission appointed after the coup of February, 1966, was followed by a long series of radical attacks. Mr Twumasi's critique[1] was the high water mark of the attacks. The radical case was put so brilliantly if at times incautiously and not without confusion, and such telling criticisms of the Proposals were marshalled by Mr Twumasi that his article provided the best opportunity for an answer.

The Radical Case

The radical attack generally and as put by Mr Twumasi could be stated succinctly. The Constitutional Proposals violated the principle of the sovereignty of the people or of Parliament, a principle which ought to be inviolable in a democratic society. Specifically, too much power was given to an unelected President; the powers of the legislature and the executive were limited; and the courts were endowed with the power of judicial review. The attack was summed up in the charge that the Constitutional proposals were shot through with an elitist theory of democracy as opposed to a mass theory of democracy. I intend in this article to take up these points and in doing so to explain the general ideas underlying the constitutional proposals and the present Constitution.

The Presidency and Independent Institutions

It was argued that the Proposals recommended a bicephalous executive one head of which, the President, was given immense powers of the State although his office was not elective. This argument did not so much as attempt to come to grips with the theory underlying the Presidency as recommended by the Constitutional Commission. The Commission held the view that the traditional theory of separation of powers was outdated and needed re-thinking. What indeed is left of the theory is the independence of the judiciary, but how is this to be safeguarded against the encroachments of the overmighty executives of the present world? Nor have modern political science and practice found a satisfactory way of safeguarding the integrity of those other institutions whose independence of the executive and the legislature is almost universally approved, at least by those who think personal freedom and uncorrupt government are high political values. I refer to such institutions as the Auditor-General's Office, state-owned mass media, electoral commissions, public services commissions, commissions of enquiry, the office of Ombudsman, etc.

The Commission hit upon the novel idea of using the Presidency to protect these independent institutions. The best way of doing this, the Commission thought, was to make the Presidency itself as independent of the executive, the legislature and political parties as possible and to put the independent institutions under it. It is clear that if the Presidency itself is not independent it cannot guard the independence of the other institutions. In other words, the Presidency was being erected into a new power in the state—in addition to the "executive-legislature", the civil service, the judiciary and the political parties. This power may be called the "protective power" because its function is not the active one of initiating or executing policy or of controlling officials in such a way as to bend them to its will, but to protect the independence of those institutions which come under it.

The independence of the Presidency was secured by four provisions. First, the President was not to be subject to re-election, for if he was, the Commission thought, the possibility of his not getting re-elected could easily be used by whoever was likely to have a majority in the electoral college to undermine his independence. Secondly, the process of his removal was to be judicial, not political: he could be removed only after he had been tried properly before the supreme court and had been found guilty of any of a number of specified offences. Thirdly, a Council of State was set up which the President had, under certain circumstances, to consult before acting so that there could be no excuse for consorting

with private or unofficial or illegitimate advisers. Fourthly, the Commission recommended that the President should be elected not by popular vote but by secret vote in an electoral college. The electoral college was to consist of two hundred and twelve members at least one hundred and seventy-two of whom would be directly or indirectly elected by universal adult suffrage. It also must be remembered that the President's qualifications were those, generally, of a member of Parliament apart from the exception that he should be at least fifty years old. It is thus difficult to see the justification for the charge of "oligarchy" and the claim that the President attains his position by "prescription."

The Constituent Assembly did not wholly accept these recommendations. The judicial process for removing the President, the establishment of the Council of State to aid and counsel him, and his election by an electoral college were accepted. But the weight of the representatives of the District Councils on the electoral college was greatly increased. From having forty-eight representatives in a college of two hundred and twelve members, they were given one hundred and twenty in a body of two hundred and eighty-eight. The important recommendation that the President should not be re-elected was rejected in favour of two four-year terms.

How was the President to protect the independence of the institutions under his care? First, he was to appoint their incumbents in consultation with the Council of State. Secondly, again in consultation with the Council of State, he was to make regulations for promoting and ensuring their efficient running. Thirdly, he was to fix the salaries of the incumbents in consultation with the Council of State. Fourthly, petitions for the removal of the incumbents were to go to the President and if he was satisfied that there was substance in a petition he referred it to the Chief Justice for judicial trial by a tribunal of judges of the Superior Court of Judicature. The President was bound to act on the recommendations of the tribunal. The President himself had no power to dismiss them and in the exercise of their functions they were "not (to) be subject to direction or control of any other person or authority (apart from themselves and the Constitution)." By accepting all these proposals the Constituent Assembly upheld the protective power of the Presidency.

A Bi-cephalous Executive?

It may therefore be said that the "executive" powers given to the President under the Proposals were powers which the Constitutional Commissioners believed, whether mistakenly or not, could not legitimately be exercised by the "executive", that is the Prime Minister or the Cabinet. It is in the light of this that criticisms of bi-cephalous executive should be considered. The mention of bi-cephalous executive raises the spectre of an executive with its powers so divided as to make it incapable of acting especially in times of emergency. Here the powers that legitimately belong to the ordinary executive are divided.

In such cases it is sometimes not clear who has control over, say the Army, as in the case of Senegal when Mamadou Dia was Prime Minister, or who has control over a radio station, as in the Congo during the struggle between Lumumba and Kasavubu. The Constitutional Commission did not recommend this type of executive; it is, indeed, doubtful whether the type of executive recommended can be called bi-cephalous at all. The proposals vested executive authority in the Cabinet except when the President was specifically required not to act on its advice. So important is this point that the relevant clauses of the Proposals must be quoted:

> The executive authority of Ghana shall vest in the President and shall be exercised in accordance with the provisions of this Constitution.[2]
>
> Any statutory instrument on any other instrument made, issued, or executive in the name of the President shall be authenticated by the signature of a Minister. [3]
>
> In the performance of his functions under this Constitution, the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, except in cases where he is required by this Constitution to act in accordance with the advice of any person or authority, other than the Cabinet, or to act in consultation with any other person or authority or in his own discretion or without the advice or consultation of any person or authority [4]

The real powers of the President, then, were in those exceptional areas where he was not expected to act on the advice of the Cabinet. These were relatively few. They were further reduced by the Constituent Assembly. Apart from protecting the independent institutions he had two further real powers according to the Proposals. The Commission recommended that during a dissolution of Parliament or when there was no Cabinet in office the President should be responsible for the administration of the country. To obviate the possibility of any President using this power to establish a "constitutional dictatorship" the Proposals had it that every dissolution of Parliament should be followed by a general election within thirty days and a new government should be formed within fourteen days of the general election. The reason for this recommendation was that the party forming the government should be prevented from taking an unfair advantage over its opponents. Too often in Africa has the party in power used its control over the civil service, the police and the army (in combination with other factors) to cheat its way back to power. This is so much so that it is almost a law of African politics that no party in power ever loses an election in an independent African country.

Apart from the direct manipulation of state institutions for party advantage, the very spectacle of party leaders parading in rural areas in formidable-looking cars, followed by retinues of hangers-on and officials and flanked by policemen and possibly security agents, intimidates poor villagers and puts the leaders of parties outside the government at an unfair disadvantage. The Constitutional Commission's recommendations would have seen to it that the leaders of all political parties were put on par during election campaigns. Alas! the Constituent Assembly removed this provision from the draft Proposals, specifically enjoining the Cabinet to carry on with the administration during dissolution but forbidding any Minister to "use or cause to be used the facilities attached to his office for the purposes of an election."[5] No sanction is even attached to this offence.

The remaining real power of the President belonged to the legislative sphere. According to the Proposals a bill could not become an Act of Parliament and, therefore,

law unless the President assented to it. Where the President had doubts about the wisdom or desirability of a bill he was empowered by the Proposals to refuse his assent and to return the bill to Parliament within a month giving reasons for his refusal. If after reconsidering the bill Parliament passed it again with a two-thirds majority of the whole membership the President was bound to give his assent to it. Where he doubted the legality of the bill he had to refer it to the judiciary. In the former case, if Parliament disagreed with the President but could not muster a two-thirds majority, the President could refuse his assent again, but if the measure was repassed by an absolute majority after six months the President was again bound to give his assent to it. Thus, the President, at the very worst, had only a suspensory veto and he was powerless in the face of a two-thirds majority—and financial bills were exempt from all these restrictions. The repeated claim that the President was to exercise "immense powers of State" may be assessed in the light of the above exposition. The Constituent Assembly however accepted these criticisms and virtually abolished the suspensory power of the President. According to the final Constitution, where the President returns a bill to Parliament he gives his reasons for doing so and makes any recommendations for amendments. If after reconsideration the National Assembly passes it again the President must assent to it.[6]

The Council of State:

The President had, in exercising his powers, mostly to act in consultation with a Council of State. The Council of State was to have a core of eleven members: The President himself, the Chief Justice, the Prime Minister, the Speaker of the National Assembly, the Attorney-General, General Officer Commanding the Armed Forces, the Minority Leader (the Leader of the Opposition) and four chiefs appointed by the President. The President could also appoint not more than eight other members as well as people who had previously held the office of either the President, Chief Justice, Speaker of the National Assembly or Prime Minister for a period of not less than three years. [7] It was objected that this group was an elderly oligarchy which was not responsible to anybody. But the reason for such a body was precisely because the Commission considered that the powers of the President were those, as already agreed, that must not be exercised by the Cabinet. And since the Council was to be only an advisory body it could not be responsible to anyone. The fact that the Prime Minister was to be on the Council at all was a concession to his importance in the governmental machinery and a recognition of his responsibilities.

The Cabinet: Modifications

The picture of an over-powerful President was contrasted with that of a Cabinet so restricted and shackled with constitutional limitations as to render it incapable of any serious action. We have, however seen from the above quotations that executive authority was in fact vested in the Cabinet, apart from the specific exceptions noted above. The articles quoted would by themselves be enough to establish the authority and power of the Cabinet. Nevertheless the Proposals went out of their way to reinforce the Cabinet's executive authority. Thus, the Cabinet was pronounced the government of Ghana[8] and was specifically charged with the responsibility of determining the general policy of the government.[9] Virtually the whole gamut of the usual executive power was placed in the lap of the cabinet. But the manner of exercising some of the powers, especially those that affect the liberty of the individual directly, was defined, and, therefore, limited. One example quoted by Mr. Twumasi may be cited. There is the case of the National Security Council whose duty is to co-ordinate, integrate and supervise the different facets of national security and to ensure that national security work is related to the actual and potential threat to the security of the State. The reason for setting up such a body was, at least. to discourage, perhaps even prevent, the perversion of national security to serve the personal or partisan ends of those temporarily in government. The National Security Council, according to the Proposals, should consist of a core of eight: the Prime Minister, four other Ministers including those holding the offices of Defence, Foreign Affairs and Interior, the Attorney-General, the General Officer Commanding the Armed Forces and the Head of the Police Service. Since the Head of the Police Service was to be appointed by the Prime Minister, as were the four Ministers, it followed that of this core of eight members the Prime Minister appointed five—and he was himself a member. This core could appoint some other persons to be members. Whatever the reasons for establishing this body it could not frustrate the Prime Minister when carrying out legitimate functions; only functions he would rather keep away from it could be so frustrated. The claim that the Prime Minister was in a minority on this body was a plain factual mistake.

It should be added that the way the Constituent Assembly emasculated these recommendations, there was no need to retain the provisions in the Constitution at all. The National Security Council now consists of the Prime Minister and five other Ministers. Other members can be co-opted.[10] The composition is thus such that it is not a check on the government; it is simply a consultative body set up by the Prime Minister. The Constitution should not be burdened with such bodies.

It was sometimes argued by radical critics of the Proposals that the restrictions on the executive were not to be found only in relation to the powers of the executive but also in relation to its composition. The Cabinet was to consist of the Prime Minister and not more than seventeen and not less than eight other Ministers of State. The Prime Minister was, normally, to be nominated by the President for the approval of Parliament. The

1. *Transition* 37, 1968, Volume 7 (vi)
2. Art. 39 (1) (Art. 37 (1) in the final Constitution)
3. Art. 39(5) (Slightly modified in Art. 37 (5) in the final Constitution.
4. Art. 40 (1) (Art. 38(1) in the final Constitution)
5. Constitution of Ghana, Art. 87(6) and (7)
6. Constitution of Ghana Art. 84(7) and (9)
7. The Constituent Assembly removed the Chief Justice, the Attorney-General and the General Officer Commanding the Armed Forces from the Council of State. It also reduced the number of ex-Presidents, ex-Prime Ministers, etc., to four. Finally, the President can nominate only eight others not more than four of whom shall be Chiefs. (See Constitution, Art. 53 (1) (a) — (c).
8. Art. 61 (1) (This is deleted from the final Constitution).
9. Art. 61 (3) (61(2) in the final Constitution modified to read: "The Cabinet shall determine the general policy of the Government and shall collectively be responsible to the National Assembly.
10. Constitution, Art. 54(1)

approval was to be given in a secret vote by a majority of all the members of Parliament. The other Ministers were to be nominated by the Prime Minister for similar approval by Parliament. A maximum of eight Ministers might come from outside Parliament. Each Minister was to be "responsible for the business of the Government relating to his portfolio, including the administration of any Ministry or Department of State" within the limits of the general policy determined by the Government. A vote of no-confidence could under the Proposals, be passed in an individual Minister by Parliament and the particular Minister had, thereupon to resign. These two recommendations, taken together, constituted a departure from the norms of the British Cabinet system in which a vote of no-confidence in a Minister, no matter what the nature of his offence may be, constitutes an attack on the whole of the cabinet.

The departure was deliberate. The Commission felt that the British practice is a product of history which cannot be rationally defended. A distinction can surely be drawn between a policy that has been determined or agreed upon in the Cabinet and the individual acts of a Minister, and it seems proper that a Minister should be responsible for his individual acts whilst all Ministers should, together, be responsible for policies determined by the Cabinet as a whole. It surely frustrates the work of Parliament if the life of the whole Cabinet should be put at the stake over, say, the administrative blunders or the corruption of a Cabinet Minister. Indeed, this practice works in Britain itself only because by convention a Minister who gets himself into such a mess resigns of his own volition before a vote of no-confidence will have been passed. This proposal of the Commission did not, of course, mean that the Cabinet could not, where it considered it necessary, come to the defence of a Minister who was threatened by a vote of no-confidence in Parliament: the Prime Minister could transform such a vote of no-confidence into one in himself or the Cabinet by simply announcing that he regarded it as such. What the recommendation did mean was rather that a vote of no-confidence in a Minister should *not necessarily* be a vote of no-confidence in the Cabinet or Government as a whole.

The departures from the classical pattern of cabinet government proved too much for the Constituent Assembly. It permitted only one departure to remain: election of the Prime Minister by the National Assembly only where no party leader appears to have a majority there. A particularly unfortunate change made by the Constituent Assembly is that all Ministers must be Members of Parliament. After the election of September, 1969, no Minister could be appointed from the Volta Region, the victorious party having won only two seats there, no one else could be appointed a Minister from there. This has done more harm to the unity of the country than anything else.

Prime Minister:

The position of the Prime Minister himself appeared to be a ground for concern. It has been pointed out above that it was he who would appoint the other Ministers or, more strictly, nominate them for the approval of Parliament. He also, according to the Proposals, had power to dismiss any Minister, even without reference to Parliament.[11] It was the Prime Minister who was to summon and preside over the meetings of the Cabinet, which had authority to regulate its own procedure at its meetings. When the Prime Minister was outside the country it was he who was to appoint another Minister to preside over Cabinet meetings, as, indeed, he could do at any time. And it was the Prime Minister who was to be the link between the Cabinet and the President. The recommendation that a vote of no-confidence could be passed in the Prime Minister and that he must as a result of any such vote resign, could, therefore only mean that such a vote of no-confidence in the Prime Minister was a vote of no-confidence in the Government and the Prime Minister's consequent resignation could only mean the resignation of the whole Government. It is noteworthy that whereas Parliament was required to elect a new Prime Minister after passing a vote of no-confidence in a previous one, no similar act was required of Parliament when it passed a vote of no-confidence in an ordinary Minister.

Votes of No-Confidence:

The modifications in the theory and practice of votes of no-confidence recommended by the Constitutional Commission went deeper than has been indicated so far. We have seen that a vote of no-confidence could be passed in an individual Minister without necessarily involving the whole Cabinet.

The Commission also recommended that Parliament should not have the power to avail itself of the right to pass votes of no-confidence as liberally as the British Parliament can and does avail itself. Seven days' notice had to be given of a vote of no-confidence and at least one quarter of all members of Parliament must have signed the notice for the motion. And no motion for a vote of no-confidence in the Prime Minister could be moved in Parliament within twenty-four months of the assumption of office by a Prime Minister. Most important of all, the defeat of a Government on any measure before the National Assembly would not, by itself, amount to a vote of no-confidence in the Prime Minister (or the Government or the Cabinet). The modifications were recommended by the Commission for two reasons. First, because of the desire to improve the chances of governmental stability. One cannot at all be sure of the nature of the party system in an African country where there is freedom of association, but the likelihood is that there will be a multi-party system. In a multi-party system the governmental instability that will probably follow the unrestricted right of Parliament to pass votes of no-confidence need be guarded against. The second reason is that the Commission could not quite grasp why if the Government is defeated on its education policy it should resign, for such a vote simply means that Parliament does not accept the Government's educational policy; it does not mean that Parliament has lost confidence in the Government. The British practice, whereby a defeat on any major policy of the Government means the resignation of the Government as a whole, encourages blind party loyalty and prevents an objective and dispassionate examination of governmental policy. Such a practice is neither sensible nor desirable. Apart from the votes of no confidence in individual Ministers and the prohibition of votes of no confidence in the Government within the first-twenty four months of its election, the Constituent Assembly accepted the Commission's recommendation on this point. The present position in which the

Progress Party has two-thirds of the seats in Parliament obscures the importance of these modifications. One of course must not assume that the position will always be the same.

The Judiciary:

The attack on the recommendations relating to the Judiciary was two-pronged. The Judiciary in Ghana, it was argued, did nothing under Nkrumah to justify putting any trust in it, and it was further argued, in general that it is undemocratic to vest the power of constitutional interpretation in the judiciary. The behaviour of the Ghana judiciary under Nkrumah is very much a matter of opinion; nor is it of general interest.

The general attack on the power of judicial review is more interesting. It was claimed that to give the courts the authority to declare laws passed by the legislature unconstitutional was to give them power to substitute their notions of what is right or wrong and what is socially desirable or undesirable for those of the legislature. But in a democracy this power properly belongs to the elected representatives of the people. By controlling their representatives the people exercise control over policy: they have no such control over the courts. It is therefore undemocratic to vest the power of judicial review in the courts. This attack was sometimes linked, as with Mr. Twumasi, to an attack on the principle of sovereignty of the law, a principle to which the Constitutional Commission and, following it the Constituent Assembly, subscribed. At bottom, so went the argument, the principle is only another formula for the sovereignty of the judges of the Supreme Court. This is a popular and insidious argument which needs careful examination. Mr Twumasi confessed Socratic ignorance of the meaning of the expression, sovereignty of law, and argued that if it simply meant the rule of law then it was necessarily embodied in all written constitutions in the sense that the organs of government derive their powers from the constitution. This argument is faulty.

The rule of law was, according to Dicey, after all, at least in its modern form, derived from the British Constitution —an unwritten constitution—and it is therefore fully compatible with the sovereignty of Parliament. But the sovereignty of law and the sovereignty of Parliament are mutually exclusive. The sovereignty of law means that government is not merely according to law but ultimately according to a Constitution which is above *all other laws* in the State. The powers of Parliament itself are derived from this supreme law, the exact reverse of Dicey's third principle of the rule of law according to which the British Constitution is the result and not the source of the ordinary law of the land. Therefore, any law passed by Parliament which conflicts with the supreme law is *ipso facto* invalid. If the constitution, according to the principle of the sovereignty of law, is the supreme law, then it has to be interpreted by the body set apart to interpret the law of the land, a body consisting of people trained in the law and encouraged, given all incentives, to develop judicial habits of mind; above all, a body that is independent of the legislature and the executive. Logically, there is no escaping judicial review where the constitution is regarded as the supreme law of the land. For a court may be faced, as courts often are, with a law passed by the legislature which is in conflict with another law, that is an article or a clause of the constitution. The court has then to decide which of the two conflicting laws is applicable. Now, since the constitution is the superior law, the court is bound by its oath to set the lesser law aside. One cannot run away from the logic of Chief Justice Marshall in the celebrated case of *Marbury vs. Madison:*—

> .....If the laws conflict with each other the Courts must decide on the operation of each.
>
> So if the law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case so that the Court must either decide the case conformably to the law, disregarding the Constitution, or conformably to the Constitution disregarding the law, the Court must determine which of these two conflicting rules governs the case. This is the very essence of judicial duty.
>
> If then the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act must govern the case to which they both apply.

Judicial Review in America

Mr Twumasi argued, quite wrongly, that the principle of judicial review has been abandoned in America. The current notion among lawyers in America is one of judicial self restraint, not one of judicial self-abnegation; the Supreme Court must not rush to strike down legislative enactments for light reasons, but should do so only after careful examination and after conceding the legislature the fullest benefit of the doubt, but it is certainly not correct to say that the Supreme Court has divested itself or has been divested of the power of judicial review. Nor did Chief Justice Holmes maintain more than is here being maintained. His statement quoted by Mr. Twumasi is clear on the point: ".....when the people of the various States want to do something and *I can't find anything in the Constitution expressly forbidding them to do so*, I say, whether I like it or not, Goddammit let them do it" (my italics). The statement, Mr. Twumasi pointed out, was made in 1937. Surely, the Supreme Court has since then both upheld the constitutionality of certain enactments and struck down a number of others on the ground of incompatibility with the Constitution.[12] Indeed, since 1937 the Supreme Court has adopted a more activist doctrine in Civil Rights cases or in cases involving personal rights.

Without the positive attitude of the Supreme Court in civil rights cases American Negroes could hardly have made their recent impressive gains in the realm of civil rights. Indeed, the current civil rights campaign can be said to have started with the decision in *Brown vs. Board of Education* (1954). What Mr. Twumasi was condemning was not really the principle of judicial review, but its abuse. Judicial self-restraint is undoubtedly a virtue, but, like all other virtues, it cannot be written into a Constitution.

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11. Art. 64(2)(b) of both the *Proposals* and the Constitution
12. Examples of the former are South Carolina *vs* Katzenbach (1966). Katzonach *vs* Morgan (1966), Communist Party of the United States *vs* Subversive Activities Control Board 1961), and Scales *vs* United States (1951). Examples of the latter are Southern Pacific Co. *vs* Arizona (1945), Morgan *vs* Virginia (1946), Illinois ex. ref. MaCallum *vs* Board of Education (1948), Brown *vs* Board of Education (1954), and United States *vs* Lovett (1946).

Written Constitutions and Judicial Review:

It was argued by Mr Twumasi that judicial review did not logically flow from written Constitutions and he cited continental examples in support of his argument. He preferred the continental practice whereby constitutions are interpreted not by courts but by politicians. But the continental practice makes sense for only one reason: the so-called written constitutions on the continent are not regarded as supreme laws in their countries but as guides to political action, to be changed or even ignored when inconvenient. The plebiscitary democracy of Switzerland cited by Mr. Twumasi fully supports this argument, for in Switzerland the Constitution is in reality never enforced; whatever the electorate wants (as expressed in a referendum) is done and if it conflicts with the Constitution then the Constitution is *pro tanto* amended automatically. And President De Gaulle showed how easy it is to ignore the so-called decisions of the group of politicians who purport to interpret the Constitution in France. If the continental constitutions were supposed to be binding laws they would, in Marshall's phrase, be "absurd attempts on the part of the people, to limit a power in its own nature illimitable." It would in that case be as sensible to ask the representatives of thieves to interpret and apply the law of fraud as it would be to ask the representatives of politicians to interpret a constitution. Nor is it clear why politicians should not also interpret the law of property, the law of inheritance, the law of incorporation, etc., since these may affect the distribution of political power more fundamentally than the law of the Constitution. If the answer is that Parliament can always change perverse interpretations then it can equally well be maintained that constitutional amendment can always take care of perverse interpretations of the Constitution. The French practice is premised on the principle of the sovereignty of Parliament, and I suspect that is what accounted for its being preferred. To the theory of the sovereignty of Parliament I must now turn.

Parliamentary Sovereignty :

What exactly is the meaning of parliamentary sovereignty? According to the exposition of Dicey and the pronouncement of Sir Edward Coke, two things characterize sovereign Parliaments: (a) they have the right to make or unmake any law whatever; and (b) no person or body is recognised as having a right to override or set aside the legislation of Parliament. If these were to be accepted in Ghana, if the theory of parliamentary sovereignty were to be a principle of government in Ghana, then the legislature in the country would not have any legal limitations on its power; it would be capable of passing any law *in spite of the Constitution.* The implications of this should not be missed: the legislature would be competent to change the Constitution at will and without reference to the electorate, probably even under certificates of urgency; it would have the power to abolish the trade unions, set up a one-party dictatorship, reduce the judiciary to a department of the executive, institute imprisonment without trial, seize properties or citizens without compensation, institute censorship over the press, books and Universities; and the courts would not be competent to decide whether Parliament in purporting to exercise these powers is not going beyond the limits set by the Constitution. No wonder the Constituent Assembly had no truck with Parliamentary Sovereignty. In the final Constitution the powers of Parliament are limited and the right of the courts to interpret and enforce the Constitution is firmly entrenched. [13]

Popular Sovereignty:

The theory of parliamentary sovereignty is sometimes confused with the theory of the sovereignty of the people, the Bodin—Austin—Dicey theory is confused with the Rousseau doctrine. Either Parliament (or the Prince) is legally supreme or it is not; there is no *via media* in this. Either the word of Parliament is necessarily law or it is not necessarily so; if it is, Parliament is sovereign; if it is not, Parliament is not sovereign.

It is possible to argue validly that both Parliament and the people are sovereign at the same time only by postulating an unerring identity of interest between Parliament, the representatives of the people, and the people. It was precisely on this ground that James Mill argued in his *Essay on Government* for a sovereign unicameral legislature. But such an identity does not exist, except during certain fleeting moments. Rousseau was acutely aware of this and, consequently, insisted that if the sovereignty of the people was not to be impeded or perverted in any way there must be no representative institutions in the State and the people should exercise their power directly. This dilemma is seemingly resolved by saying that whilst the people are "politically" sovereign Parliament is "legally" sovereign. This is the Jennings-Laski position and as a way of speaking one may not cavil at it. But what this position asserts is that although Parliament is sovereign sooner or later it bends to the expressed wishes of the public, that in the long run the laws are thoroughly informed by public opinion as in Britain.

It is important to stress that the Jennings-Laski position was established in relation to Britain because it presupposes that in Britain the normal democratic processes work with relative freedom and efficiency and that, therefore, in the last analysis the public can enforce its will by changing the personnel of Parliament. It is this vital point that was ignored by the radical critics of the Proposals, who were at the same time in favour of a free political system. By ignoring this vital point the critics failed to ask themselves whether any legislature on the African continent—from South Africa to Tunisia, from Senegal to Kenya—could be *trusted of its own volition* to keep open those democratic institutions and practices which make possible the co-existence of "political sovereignty" and "legal sovereignty", the sovereignty of the people and the sovereignty of Parliament. For my part, it seems to me demonstrably clear, almost axiomatic, that such a trust cannot yet be put in any of the legislatures on the continent.

Constitutionalism and Natural Law:

To the principle of Parliamentary sovereignty the Constitutional Commission—believing, with Burke, that "law and arbitrary power are in eternal enmity" and that "it is a contradiction in terms... blasphemy in religion... wickedness in politics, to say that any man can have arbitrary power"— unreservedly opposed the principle of constitutionalism. The fundamental fact about constitutionalism, as McIlwain has clearly

shown, [14] is the idea of limited government. Modern constitutionalism may be defined as the principle of limited government according to fixed, pre-determined rules which are enforceable against the government itself. According to this principle, the powers of a government are determined for it and not by itself; the powers are limited both as to their extent and their manner of exercise; and the limitations are embodied in rules that can be enforced against the government whenever the latter threatens to overstep its limits. "A constitution", said Tom Paine, "is a thing *antecedent* to a government; and a government is only the creature of a constitution". The history of written constitution in seventeenth century England and eighteenth century America is clear on the point: because rulers chose at their will to ignore the conventional limits on their power it was found necessary to set these limits down on paper and to make them legally *enforceable against the government*.

The idea of constitutionalism is of course nothing new: it goes back to Aristotle. He expressed it when he defined a constitution as "an organization of offices in a State, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association and all its members is prescribed." There was no "government" or "legislature" to enact such a constitution; these were, indeed, the product and not the makers of the constitution. The constitution was in fact part of the law. It is not expressing forcefully enough Aristotle's idea of law if one merely uses expressions such as "vague" and "custom" to describe it, for his was the general Greek idea of law. Behind the Greek mind there was always the notion of a law that was the product of nature and that was beyond the puny efforts of man to change. This notion was best expressed by Antigone, who refused to hold that royal proclamations could override

> The unwritten and undying laws of God:
> Not of today nor yesterday, the same
> Throughout all time they live; and whence they came
> None knoweth.

The idea was to pass from Aristotle to St. Thomas Aquinas and to the Whigs whence the modern notion of constitutionalism is derived. Burke put the idea in some famous phrases in his speech at the impeachment of Warren Hastings. "We are all born in subjection—all born equally, high and low, governors and governed, in subjection to one great, immutable, pre-existent law, prior to all our devices and prior to all our contrivances, paramount to all our ideas and all our sensations, antecedent to our very existence, by which we are knit and connected as in the eternal frame of the universe, out of which we cannot stir". However, Natural Law is always so transcendental, so mystical as to be beyond human reach, unless it is embodied in rules derived by those particularly qualified to derive them. But written constitutions which are regarded as law are human attempts, however imperfect, to reach for Natural Law: they are attempts to impose upon governments and legislatures fixed rules which are beyond their reach and which prescribe in particular what is illegitimate and is, therefore, forbidden to governments and legislatures alike.

Up to a point, constitutionalism is also opposed to popular sovereignty. The classical notion of sovereignty makes the powers of the sovereign unlimited, illimitable and individual. Also, it makes command the essence of law. Popular sovereignty therefore comes to mean, especially in its modern, mature, Rousseauist formulation, unlimited self-assertion by "the people". What is right and what is legal are, therefore, simply what the people have decreed. But there is neither shame nor dishonour in repudiating this notion of popular sovereignty. The people are not necessarily right. Rousseau realized this and tried to provide a corrective by dragging into his argument the notion of a General Will, but in this he failed totally, only succeeding in providing a rationalization for dictatorship. To accept this notion of popular sovereignty is to concede to the people the right to behave as Plato's democratic man and Chinua Achebe's Man of the People. To this notion of popular sovereignty, the idea of constitutionalism is necessarily, and rightly, opposed.

But there is a looser concept of popular sovereignty, if sovereignty it can be called, which is not incompatible with the idea of constitutionalism and which the Constitutional Commission did not and could not repudiate. There is a sense in which it can be said that ultimately all political power derives from the people, for when the people are determined to assert their will no power on earth can stop them. In the last analysis they can assert their will in a revolution and the general mass of mankind are so long-suffering that a genuine, popular revolution is almost always *ipso facto* evidence of a deep wrong in society. Any constitution that purports to take away this right is therefore engaging in a futile act: it can only succeed in destroying itself. The important thing therefore is to regulate the exercise of this power and it is this that the Proposals attempt to do. In other words the people's power is limited not as to its amount but as to the manner of its exercise, a limitation that is nevertheless incompatible with the traditional notion of sovereignty. But he who approves this position need not be apologetic, for unlimited self-assertion is neither virtue nor wisdom in masses of people as well as in individuals.

Social Justice and Economic Development:

The predilection for unlimited power either for the people or for legislatures is neither new or confined to Africa. But in its relation to Africa it assumes extreme urgency, because it is held to be closely connected with the problem of economic and social development. It is a trite observation that the need for rapid development in Africa is an overriding one, and it is often claimed that it is to promote this that all power must go to the "legislature – executive." It is also part of the argument that for the realization of social justices, which must be an overriding objective of all developing countries, power must be concentrated in the hands of the "legislature – executive." Looking at the constitutional Proposals (and this also goes largely for the final Constitution), however, it is not immediately clear how they would hamper rapid economic and social developnent and the realization of social justice. In considering this problem one must be careful not to exaggerate what constitutions can positively do to promote social justice and economic development. A constitution can only set up institutions and endow them with power. Whether the power will be used to promote social justice and economic development or not will depend, first, upon those who will wield the powers of the various institutions

and, second, the relationships existing between those who wield power and the general mass of the citizens. However, the Proposals fully addressed themselves to the problem of social and economic development and social justice.

The Preamble proclaimed that the Constitution should guarantee, *inter alia.*

JUSTICE— social, economic and political;
RESPECT— for the dignity of the individual; and
EQUALITY— of status and opportunity.

These by themselves, are merely unenforceable ideals. But the main body of the Proposals put teeth into them. The fundamental rights entrenched in the Constitution include protection from slavery and forced labour; protection from inhuman treatment; and freedom of assembly and association. And full political democracy is also guaranteed. Thus, the legal machinery of the state is available to fight exploitation; under-privileged groups can form their associations, such as trade unions and farmers' organizations, to ensure social justice; and most important of all, they can organize politically to sustain their efforts in the economic field. Nor is the Constitution found wanting in relation to social reform and economic development. The legislature is fully competent for these purposes. Thus the whole field of education, agriculture, industrialization, labour matters, wages, investment, state enterprises, trade, health, communications, fuel and power, local government, administration, scientific research, geological surveys, mining, forestry, banking—indeed, the whole gamut of social and economic matters is firmly in the hands of the legislature and, hence, in the cabinet. If ever social reforms and economic development are retarded or frustrated in Ghana it will be due to either the unwillingness or the incompetence or the corruption of the people in authority, or else to the political lethargy of the general mass of Ghanaians.

The radical critics will no doubt not be satisfied by all this. They believe,apparently on *apriori* grounds, that for social and economic reforms to be pushed through in developing countries all power must be conferred on the central government. "The argument that makes liberation conditional upon an ever higher standard of living," Herbert Marcuse has written in *Eros and Civilization*, "all too easily serves to justify the perpetuation of repression". No convincing arguments, however, have been brought forward to prove that it is necessary if social and economic reforms are to be pushed through fairly rapidly, that the government should have the right to detain people without trial, commit the enormous crime of genocide, (as did Stalin) prevent the citizens from exposing the incompetence or corruption of office-holders, fritter away scarce resources on grandiose but economically useless projects, etc. These things do not necessarily flow from parliamentary or popular sovereignty, but in an Africa where the large masses of the electorates are illiterate, where the forms of government that are promoting modernization are alien to the mental and moral habits of the masses of people generally, where the educated middle class is weak, where independent institutions are weak, where dependence on the government is more often than not so great as to be almost pathetic, to refuse to put legal curbs on the power of the government or the people is to refuse to provide institutional safeguards against the abuse of power.

In Ghana itself the record is clear that unrestricted concentration of power in the hands of the central government far from promoting economic and social progress, can seriously retard it. Of course, to restrict the power of the government does not, of itself, also necessarily lead to much needed economic reforms. But such restrictions provide the safeguards which, given the human material, direct the government's attention to its proper functions, prevent unnecessary hardships or even crimes, and safeguard individual freedom. If in spite of such safeguards the government fails it will then not be due to want of trying.

When constitutions in developing countries are discussed attention must properly be directed to provisions regarding property, land and finance for they are most likely to impinge directly on measures for social and economic reforms. The Constitution, following the Proposals, makes a number of such provisions, but an examination of these provisions shows that their purpose is to prevent abuse of power and, in relation to stool lands, to ensure a minimum spread of economic development over the whole country. Article 18 makes provision for protection against deprivation of property, but only deprivation without adequate compensation. It also lays down safeguards against seizure of property for private purposes. The article is quite clear that it cannot be used to escape taxes, rates or dues. Article 164 established for each Stool or Skin an account into which all rents, dues, royalties, revenues or other payments from Stool and Skin lands will be paid. A Lands Commission is set up as a more or less independent body whose membership is nevertheless dominated by the representatives of the government and is made a supervisory authority to ensure that stool and skin lands are not misused and that incomes accruing from them are used mainly for the development of the areas in which they are situated. The whole of Chapter Eleven of the Constitution deals with Finance. The purposes of this Chapter is to ensure, firstly, that government accounts are set out efficiently, secondly, that public funds are not fraudently diverted into private pockets and, thirdly, that the power over the purse is kept firmly under the authority of the people's representativs and not used by the government to reduce them into impotence. Thus, loans and taxation without express approval of Parliament or without the authority of an Act of Parliament are prohibited and the independence of the Auditor-General is safeguarded. These provisions were deliberately made, and it is submitted that they are safeguards which do not retard social reform and economic development.

There is of course one way by which constitutions can seriously hamper social and economic reforms: by including provisions prohibiting to the government—the legislature or the executive—powers which are necessary for the promotion of social and economic reforms. In attempting to impose legitimate restrictions on governments constitutions may go too far. The principle of limited government may be admitted, but it may be argued in detail that certain provisions go too far. Because the radical critics argued against the whole concept of limited government they either failed to bring out a number of such provisions in the Proposals or they used them to illustrate their arguments against the very idea of limited government. A number of such provisions which the Constitution took over from the Proposals may be cited. The most important of these define the

amendment process, which is too complex. It is never right to make a constitution too rigid; it should be rigid enough to prevent hasty amendments and "constitutional *coups d'etat*", but it must not go further than that. In this connection it may be mentioned that the attempt to forbid completely the amendment of certain provisions[15] and to forbid the amendment of certain other provisions without the approval of the Supreme Court[16] is likely to invite instability. The Supreme Court is given the authority, to disallow certain amendments on the ground that they "detract or derogate" from the provisions they seek to amend, and to decide whether any amendment is "by itself or in its effect, against the spirit of this Constitution."[17] These powers will inevitably drag the Supreme Court violently into political controversy. As the Memorandum on the Proposals pointed out, "to drag the Courts into the centre of political controversy is to endanger their independence and the respect people have for them." Moreover, judges are usually conservative people, and they have been known to take instant dislike to social reforms. To give them such a power therefore is to give them the tools with which to obstruct legitimate social reform.

Chieftaincy and Local Government

The position of chiefs is closely bound up with the social order in large areas of the country, and it is true that chieftaincy has important consequences for law and order, but no more than have trade unions which can virtually disrupt the economic life of the country in no time. Yet, although no one who cares for individual liberty advocates that government must have a primary voice in determining the choice of office-holders in the trade union movement, there are many such people who advocate that government must play such a role in the appointment of chiefs. Actually, it is not because chieftaincy has important consequences for law and order that this demand is made. Rather, the demand is made because chiefs have political influence especially in the rural areas. That is precisely why the colonial government removed chieftaincy cases from the sphere of the courts to that of the executive. The colonial government wanted to use the chiefs as instruments of its policy and because of this it acquired the big stick over them, the right to recognize them or withdraw recognition from them, which broadly meant the right to make or unmake chiefs. The record is that it was this assumption of power by the colonial government which led to the unpopularity of the chiefs; they began to "sit on gazettes" rather than on stools or skins. The nationalist successors of the colonial government were only too glad to avail themselves of this enormous power to bend chiefs to their purposes, including sustaining their parties and suppressing their opponents.

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13. Constitution, Ch. I especially Arts. 2 and 3(1)
14. See Charles Howard McIlwain, *Constitutionalism: Ancient and Modern*, Revised Edition, (Great Seal Books, N.Y. (1947)
15. Art. 169(3)
16. Art. 169 (4)
17. Art. 169(4) and (8)
18. Constitution Art. 155
19. „ Art. 154(1)
20. „ Art. 102 (4)

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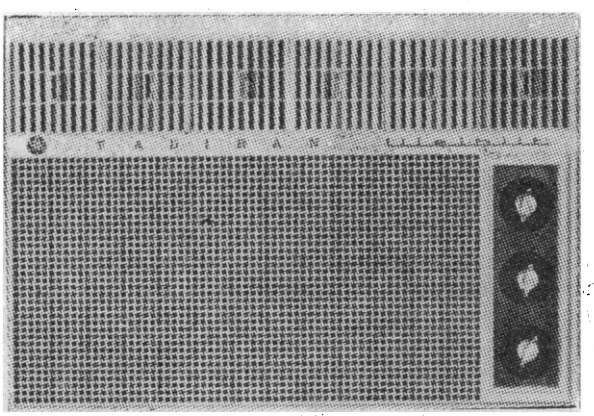

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The Constitution Commission was of the opinion that chiefs must enjoy the respect and obedience of their own communities. There are rules laid down for finding out which member of the particular community concerned satisfies the criteria of a chief acceptable to it. These rules are in fact constitutional laws and are capable of being interpreted by the courts as used to be done before the colonial governments' usurpation. If, indeed, this tradition had not been broken, by now a "common law" would have been built up to regulate chieftaincy in the country as a whole. Instead, we now have a jungle of customs which permit the Central Government a very wide ambit of arbitrary power. All that the Constitutional Commission recommended was that determination of chieftaincy disputes should go back to the courts and that only local communities, subject to customary law, should determine who should be their chiefs. It is difficult to see why this recommendation should prevent the Government from maintaining law and order where this is threatened by chieftaincy disputes. As well might it be suggested that disputes over ownership of land threaten law and order unless the government itself and not the courts can determine such disputes.

On the whole, the Constitutional Commission was not particularly tender to the chiefs in the distribution of political power in the country. The only constitutional power accorded the chiefs on the national level was the right to have four of their number on the Council of State to be maintained by the President and to elect twenty-four of their number to the electoral college which is to elect the President. It will be recalled that the Council of State had a core of eleven members; it was not likely to have less than about eighteen to twenty members. The electoral college was to have two hundred and twelve members. On the regional level the chiefs were to have two representatives in each of the Regional Development Councils, bodies that were to plan and co-ordinate regional development projects. In addition to the representatives of the chiefs each Regional Development Council was to have representatives of the District Councils in the Region and Central Government representatives. The head of a Regional Development Council was to be appointed by the Prime Minister. The original Houses of Chiefs which had existed since independence were left entirely to the legislature.

It was at the local level that chiefs or, to be more accurate, traditional representatives were to have substantial power. The Commission recommended a two-tier system of Local government, Local Councils at the lower level and District Councils at the higher. The areas of Local Councils were to be coterminous with those of traditional authorities. The Councils were to consist of one-third of members elected by universal adult sufferage and two-thirds of members "chosen in accordance with traditional and customary usage." These Councils were to perform such functions as are peculiar to the traditional authority within their area of authority; functions in relation to community development as might be assigned by Parliament; and such other functions as might be assigned to them by District Councils. The District Councils were to consist of one-third of members chosen by Local Councils in accordance with traditional custom and usage and two-thirds of members elected by universal franchise. District Councils were to be responsible for the administration of their areas of authority and were to perform such other functions as Parliament might prescribe. What these recommendations meant was that the traditional and modern system of local government are being fused into a single system in which the more modern units would have the upper hand while the more traditional units were more than mere ornaments. Modern blood was to be infused into the traditional units at the lower level, and traditional blood was to be infused into the modern units at the higher level. But there was no question which of the two units was the more important: the District Councils, the modern units, were to have the real powers of local government.

The single system recommended by the Commission embodying both the traditional and modern units is to be distinguished from both the colonial practice and the practice since 1951 when modern local government was introduced. From 1927 to 1944 the colonial government in the Gold Coast tried to vest traditional councils with competence in modern local government functions. Although the traditional councils tried to give representation to some of the educated sections of their communities they were not able to command the loyalty of the educated and the youth. On the recommendation of the Coussey Committee, the system was replaced by elected councils one-third of whose members were appointed by the traditional authorities which continued to exist side by side with the elected councils. Later the traditional representation was removed altogether and a simple dyarchy reigned in the rural areas until disillusion with the elected councils led to a swing back to the chiefs in the Development Committees.

Unfortunately for the radical critics, their criticisms of the position of chiefs boomeranged: the chiefs were alerted, and they succeeded in enhancing their place in the Constitution during the proceedings of the Constituent Assembly. They succeeded in blocking the infusion of modernity the Commission sought to administer through the single local government system dealing with both modern functions and traditional matters. They obtained the imprint of the Constitution for the Regional Houses of Chiefs,[18] which the Commission had left to legislation. They also succeeded in getting the Constitution to establish a National House of Chiefs.[19] Moreover, they succeeded in getting a commitment in the Constitution to the re-establishment of the much-hated traditional courts.[20] For these set-backs we must thank the radicals.

Prescription and Property:

In his anxiety to hang the albatross of reaction around the neck of the Constitutional Commission, Mr Twumasi alleged that the Proposals were based upon Burke's theory of prescription and special representation for property. The highly doubtful case of chiefs—and that only at the lowest rung of government—apart, it is difficult to see which part or parts of the Proposals could justify these allegations. There was not a single instance or property qualification in the whole of the Proposals and, protection against confiscation of property without adequate compensation apart, there were no special rights for property. There was no trace of "virtual representation" in the Proposals; representation was by geographical areas and population—an anathema to Burke. Nor can instances of prescription be found in the

Proposals. All power and functions were vested in institutions access to which was to be open to all who were to be elected by universal adult sufferage or were to have q' alifications which had nothing to do with one's station in life or with custom. The Commission quite obviously did not believe in Burke's "divine tactic" which marshalls all of us each in his place, nor did it subscribe to Bradley's "my station and its duties". If the Proposals led to the establishment of an elite they did so only in the trivial sense that government in the modern state must necessarily by be a small group of people.

Conclusion:

The recommendations on local government were an attempt by the Commission to marry modern and traditional forms of government. They should not have been cast aside lightly. One of the major political problems in Africa today is how to devise institutions which are capable of grappling with the strains and stresses of development and are at the same time not repugnant to the customs and mental habits of the mass of Africans. It was in the hope of meeting these requirements that these recommendations were made. It was in the same hope that many modifications to the traditional canons of cabinet government were also made. It is the tragedy of independent Africa that the onrush of modernity has made it impossible for her to adapt her own political institutions to the requirements of the modern world, but has had to copy the political instit tions of other cult res and histories. We must not deceive ourselves: so far it is only the forms that have been copied not the vaules that go with the forms. This is so mainly because these institutions are not only alien to the mass of the people but the latter are not yet even in a position to understand the institutions, let alone to "internalize" the values that go with them. It is because of this that the unmodified British system of cabinet government and Parliament are less suitable to Africa today than any other modern form of government, for the British system assumes more than any other the internalization of the values of the system. Without the internalization of the values of Western governmental forms the governments of Africa will never be made to follow the paths of virtue and competence, and development will consequently be retarded. The recommendations of the Commission may not have succeeded in coping with this problem, but to adopt Western institutions hook, line and sinker, would be even less successful. □

ONWUCHEKWA JEMIE

POEMS

NEW YORK
dogshitsplattered
sidewalks . . .

they murdered me with 9 shots
in Georgia
& the Justice Dept
in Washington DC
ordered an investigation
to see if my civil rights had been violated

in new york city
on april fool
a crowd gathered at Korvette's
window
to witness the
farmer's miracle: the hatching of an egg . . .

The flat tired concrete squeals.

Elaborate callgirls ride the wheel,